

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,)	
)	
v.)	No. 3:08-CR-175
)	Judges Phillips/Shirley
CLARK ALAN ROBERTS, and)	
SEAN EDWARD HOWLEY)	
)	
Defendants.)	

UNITED STATES' OPPOSITION TO
DEFENDANT ROBERTS' MOTION FOR A HEARING
TO DETERMINE THE EXISTENCE OF A CONSPIRACY

The United States of America, by and through James R. Dedrick, United States Attorney for the Eastern District of Tennessee, respectfully submits this response in opposition to the Defendant Roberts' Motion for a Hearing to Determine the Existence of a Conspiracy. [Doc. 32]

The Sixth Circuit has held that, "before the government can take advantage of the coconspirator exception of the hearsay rule, it must show by a preponderance of the evidence (1) that a conspiracy existed, (2) that the defendant against whom the hearsay is offered was a member of the conspiracy and (3) that the hearsay statement was made in the course and in the furtherance of the conspiracy." *United States v. Vinson*, 606 F.2d 149, 152 (6th Cir. 1979). Such a finding must be made by the district court. *Id.* The Sixth Circuit has outlined three alternative methods by which the district court can make a determination as to the admissibility of hearsay statements under the coconspirator exception to the hearsay rule, the district court may: 1) conduct a pretrial mini-hearing outside of the presence of the jury and listen to the proof of the conspiracy offered by the United States before making the necessary finding; 2) require the

United States to produce non-hearsay evidence of the conspiracy during the course of the trial before making the necessary finding as to the admissibility of the hearsay; or 3) admit the hearsay statements subject to a later demonstration of their admissibility by a preponderance of the evidence. *Id.* at 152-53.

The Sixth Circuit noted in *Vinson* that the alternative of a pretrial hearing "has been criticized as burdensome, time consuming and uneconomic..." but left that alternative within the discretion of the district court. *Id.* at 152.

The more practical approach and the one customarily adopted by this district in past cases has been to permit the United States to present the hearsay statements subject to a later demonstration of their admissibility by a preponderance of the evidence. *See, e.g., United States v. Robinson*, 390 F.3d 853, 867 (6th Cir. 2004)("[W]e have long recognized the trial court's prerogative to conditionally admit coconspirator statements subject to later demonstration of their admissibility by a preponderance of evidence."). Such a practice historically has not produced adverse effects or unnecessary mistrials in this district.

By avoiding the unnecessary requirement of a pretrial hearing requiring the United States to produce the existence of a conspiracy the district court avoids burdensome, time consuming and uneconomic efforts which are only duplicated later at trial. Furthermore, a pretrial hearing on this matter would allow the defendant to circumvent the narrow and specific rules of pretrial discovery and to ascertain the minutiae of the government's evidence and to learn the identities of many of the government's witnesses, contrary to the legislative intent of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500. *See generally United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988).

Wherefore, the United States respectfully opposes the defendant's motion for pretrial hearing to determine existence of conspiracy. The government suggests that this Court follow its normal routine which allows the government to present hearsay statements subject to a later demonstration of their admissibility by a preponderance of the evidence.

Respectfully submitted this 5th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2009, a copy of the foregoing UNITED STATES' OPPOSITION TO DEFENDANT ROBERTS' MOTION FOR A HEARING TO DETERMINE THE EXISTENCE OF A CONSPIRACY was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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